Singapore, an offence punishable under s. 12 of the Merchandise Marks Ordinance (Cap. 157);

(2) with possession of instruments for counterfeiting the trade mark mentioned in the first charge.

The defence raised on the facts was that this "Goldfish" trade mark was the property of the proprietor of Chop Teck Chiang of Swatow who advertised this trade mark as his in the Straits Settlements Government Gazette of 20th and 27th April 1934, years before the Trade Marks Ordinance of 1938, providing for the registration of trade marks, was passed.

The defendant and others imported rice flour under this trade mark from the Swatow firm until the Japanese occupation of Swatow in June 1939, after which date the defendant says he used this trade mark with the permission of the Swatow firm.

On 2nd January 1940 Lee Yew Cheng, describing himself as proprietor of Chop Teck Chiang in Singapore, procured the registration of this trade mark in his own name under the Trade Marks Ordinance 1938. Lee Yew Cheng professed to know nothing of the Swatow Chop Teck Chiang, or the trade mark it claimed in 1934.

The appellant relied on s. 23 of the Trade Marks Ordinance, 1938:

"(1) It shall not be lawful to register as a trade mark....any matter, the use of which would by reason of its being likely to deceive or cause confusion or otherwise be disentitled to protection in a Court of Justice...."

Mr. Tampoe Philips' submission was that under this section the learned District Judge should have held that owing to the continuous use of this trade mark by other people the trade mark should not have been registered, and therefore that the present registered proprietor is disentitled to protection in a Court of Justice.

This section has nothing to do with infringement of registered marks; it describes the kind of mark that should not be registered, a matter which concerns the Registrar of Trade Marks in the first place and the High Court in the second place, but which does not concern Courts of summary jurisdiction.

Mr. Tampoe Philips argued that while 'Court' is defined in the Trade Marks Ordinance as meaning the High Court, 'Courts of Justice' in s. 23 includes any Police Court. I do not agree. As I have said, the section merely describes the sort of mark which should not be registered and adjudication on that question does not rest with a Police Court. It would indeed be anomalous if a Magistrate could decide that a mark should not have been registered, while the Registrar and the High Court upon whom the responsibility for registering or refusing to register the mark is imposed by the Ordinance, have decided otherwise.

The appellant could have objected to Lee Yew Cheng being registered as the owner of this trade mark. Had he objected unsuccessfully he could have appealed to the High Court, or, the mark having been registered, he could have taken proceedings to have the registration cancelled under s. 44 and those proceedings could not be brought at any stage in a District or Police Court.

Once a trade mark is registered under the Trade Marks Ordinance Magistrates must treat it as being properly registered and must treat the owner of an uncancelled unexpired certificate of registration as the owner of a mark which is protected by law in this Colony within the definition of "Trade Mark" in the Merchandise Marks Ordinance.

Rightly or wrongly Lee Yew Cheng is the registered owner of this trade mark and must be recognised as such until the certificate is cancelled in accordance with the provisions laid down in the Trade Marks Ordinance.

I think the learned District Judge reached a correct conclusion and I would dismiss the appeal.

Appeal dismissed.

SALT vs. MOHAMMEDAN AND HINDU ENDOWMENTS BOARD.

[Court of Appeal (McElwaine, C.J. (S.S.), Terrell, Ag. C.J. (F.M.S.) and Aitken, Ag. J.A.) June 28, 1941]

Trust—Trust Money paid by defaulting trustees to Solicitor—whether Solicitor has lien for his costs over the trust funds—position of Solicitor.

The trustees of a Mohammedan Charity the Kampong Kling Mosque in Malacca misappropriated trust funds, belonging to the Charity and afterwards paid the sum of $7,100 to the appellant, who was the Solicitor of one of the trustees. The solicitor on the instructions of the Mohammedan and Hindu Endowments Board made numerous payments out of the moneys so paid to him, such payments amounting in all to $6,061.06 and leaving a balance in his hands of $1,038.94. The Board demanded payment of the balance and the solicitor refused to pay, claiming to have a lien upon it for an untaxed bill of costs for professional services rendered to the Trustees and Committee of the Kampong Kling Mosque.

Held, (1) that in the circumstances of this case the Solicitor had no lien on the trust fund in his hands for the cost of professional services rendered to the trustees;

(2) that the money was paid to the appellant for a specific purpose and therefore the appellant could have no lien upon it apart from what might arise from carrying on that purpose.

Cases referred to:—

(1) *In re Frith, Newton v. Rolfe,* (1902) 1 Ch. 342.
(2) *Turner v. Letts,* 7 De G.M. & G. 243.
(3) *In re Dee Estates Ltd.* (1911) 2 Ch. 85.
(4) *Ex parte Angel,* 2 Atk. 161.
(5) *Staniar v. Evans,* 34 Ch. D. 470.
(6) *In re Humphreys, Ex parte Lloyd George & George,* (1898), 1 Q.B.D. 520.
(7) *Ex parte Harper, In re Pooley,* 20 Ch. D. 685.
(8) *Brandao v. Barnett,* 12 Cl. & F. 787.
(9) *Stumore v. Campbell & Co.* (1892) 1 Q.B. 314.
(10) *In re Clark, Ex parte Newland,* 4 Ch. D. 515.
(11) *In re Blundell,* 40 Ch. D. 370.
(12) *In re Love, Hill v. Spurgeon,* 29 Ch. D. 348.
(13) *Meguerdetchian v. Lightbound,* (1917) 2 K.B. 298.
(14) *Francis v. Francis* (1854) 5 De G.M. & G. 108.

APPEAL.

S. C. Goho for the appellant.

H. R. S. Zehnder for the respondent.

McElwaine, C.J.—In February 1939 Hashim bin Haji Bachee and Said bin Haji Bachee, trustees of the Kampong Kling Mosque, consulted the appellant. There were allegations that Hashim (who besides being a trustee was also treasurer and a member of the committee of management of the Mosque) had misappropriated trust funds, the property of the Mosque.

On the 1st March 1939 Hashim made good the money through the appellant's office by making a payment of $7,100 by cheque which was paid into the appellant's No. 2 (Clients) bank account. On 6th March the appellant wrote to the respondent Board which was exercising its powers of supervision of the Mosque's affairs, informing the Board that Hashim "deposited with us the sum of $7,100 which he stated was the amount in his hands due to the Kampong Kling Mosque." In the letter of 6th March Mr. Salt mentioned that Hashim had handed him several accounts amounting to $2,004.08 and Mr. Salt inquired whether the Board had any objection to his paying out these sums. On 13th March the Board replied that it had no objection to the payment from the deposit of any bills properly due to be paid, provided the receipted bills were kept by the appellant.

Out of the $7,100 the appellant made payments amounting in all to $6,061.06, leaving a balance of $1,038.94 in his hands. The propriety of the payments is not in dispute. The respondent Board in which the property of the Mosque became vested in June 1940 by virtue of an order made under Mohammedan and Hindu Endowments Ordinance (Cap. 175), demanded payment by the appellant of this balance of $1,038.94. Mr. Salt refused to pay, claiming that he had a lien upon it for an untaxed bill of costs for professional services rendered between 25th February 1939 and 3rd July 1940 "to the trustees and Committee of the Kling Mosque, Malacca".

The bill was drawn up on 22nd August 1940 and contains 180 items. No charge is allotted to any particular item but a single charge of $1,250 is made in respect of the bill as a whole.

The respondents sued for the $1,038.94 as money payable by the Defendant to the Plaintiff for money recovered by the Defendant for the use of the Plaintiff.

The defence was that the Defendant had rendered professional services to the former Trustees and Committee of Management of the Mosque who were entitled to an indemnity from and/or a lien upon the Mosque funds and that they acted legally in subrogating their rights to the Defendant and/or in acquiescing to the Defendant exercising his lien upon the said sum of $1,038.94.

Mr. Salt described his clients as the Trustees and Committee of the Kling Mosque. I do not know how there comes to be more than one trustee of this Mosque. The rules provide for one trustee and no more. The second trustee Said was not a trustee at the time of the irregularities, that is to say, between 23rd July 1937 and 23rd July 1938.

Mr. Goho submitted that if Mr. Salt was owed a single dollar with which the funds of the Mosque were legally chargeable the action must be dismissed. I do not agree. Unless Mr. Salt established that the funds were chargeable to the extent of $1,038.94 the plaintiffs were entitled to judgment for the balance. There is no definite evidence as to what sum if paid by the trustees to Mr. Salt could be recovered by the trustees from the funds of the Mosque. Some of the items in the bill of costs certainly could not have been so recovered and no specific sum has been proved as being a proper charge on the funds. Some at least of the work was occasioned by the Board's inquiries into the affairs of the Mosque and it was the default of the trustee which gave rise to these inquiries.

Whoever Mr. Salt's client may have been it was not the trust fund, and his claim for his costs was against those who employed him.

As he wrote on 5th October 1940 "unless we receive satisfaction we shall return the money to the Mohammedan and Hindu Endowments Board and bill the trustees and Committee members direct". This would have been an unexceptional course but unfortunately it was not adopted.

The appellant's case is "I have a claim against the executors and Committee of Management who in turn are entitled to be indemnified out of the trust estate, and therefore I am entitled to enforce my claim against the trust fund, especially as the default has been made good and, in any case, as one of my clients Said has never been in default". He relied on *In re Frith, Newton v. Rolfe*[1], *Turner v. Letts*[2] and *In re Dee Estates Ltd.*[3].

The point in *In re Frith*[1] was whether the creditors of a testator or the creditors of his business carried on by the trustees under the terms of the will were entitled to priority. At page 345 Kekewich J. said "when the debts of the business have been ascertained, the only one point which has to be considered is whether the trustees accounts are clear; and if they are clear then the creditors of the business are entitled to be paid, and paid in priority to the creditors of the testator".

And at the foot of the same page the learned Judge says: "The creditor has no right whatever against the estate, but he has a right to sue the trustee who has incurred the debt. If the trustee on his part has a clear account, and has a right of indemnity against the estate, the creditor is subrogated to that right, and for that purpose the creditor is allowed to intervene". The learned Judge proceeded to say that the fact that one of these trustees was in default did not bar this right, since the indemnity to the trustees is not to the trustees as a body, but to each of the trustees. The trustees who had cleared their accounts could be sued for the debt and unless they were responsible for the defaulting trustee, they were entitled to be indemnified out of the estate, and the creditors had the same right. See too *Ex parte Angel*[4].

Upon this case I observe that the Master had held an inquiry and had ascertained the debt due to the creditors. The debt due to Mr. Salt has not yet been ascertained.

In *In re Frith*[1] neither *Staniar's case*[5] nor *Ex parte Humphreys*[6] to which I shall refer in a moment, was cited so far as the report indicates and it seems to me that there is a difference between the rights of trade creditors against a business which is being carried on by a trustee and the rights of a solicitor who is personally retained by the trustee.

The basis of such cases as *In re Frith*[1] is that in them there was a trust estate or portion of a trust estate appropriated for the purpose of carrying on the business and it was reasonable and proper for a trade creditor of the business to have resort to that trust estate.

Turner v. Letts[2] merely decided that a solicitor who defended a suit by *cestuis qui trustent* against an executrix had a lien on title deeds of the testator's property unless the executrix was indebted to the estate. The executrix, if not indebted, had a lien and the solicitor had a lien to the same extent. The case was stood over pending a decision of the issue whether the executrix (who had died) was in default.

I can draw no assistance from this case. The executrix was sued and she filed a defence but died before trial of the action. Her liability had not been as yet established, and until it was established the solicitor had the same lien that his client had on the documents.

That case appears to me to be the converse of the present in which the right of the trustees to be indemnified out of the trust fund has not been established either as to the right itself or as to the quantum.

In *In re Dee Estates Ltd.*[3] the solicitor's bill of costs had been taxed. The only point in the case was whether the lien extended to costs incurred in relation to the trust before the execution of the trust deed, a point which does not arise in this case. But the case is an authority (if authority is needed) for the proposition that a lien on deeds against a trustee is a valid lien against a new trustee of the same trust.

The case principally relied upon by the respondents is *Staniar v. Evans*[5] where North J. said at p. 477: "The person employed by trustees to act as their solicitor with respect to a trust estate, is commonly enough said to be a solicitor to the trust estate. But that is an inaccurate way of describing his position. He is not solicitor to the trust estate. He has no retainer from the trust estate, and he is not "employed by the trust estate, but he is the person employed by the trustee for his own purposes as

trustee. His retainer is by the trustee personally. The trustee personally is liable to pay his costs, and the trustee personally is the only person to whom the solicitor can look for those costs. The solicitor for the trustee has no lien whatever upon the trust estate for those costs. That is the general rule." The learned Judge then gave the exceptions to the general rule none of which is applicable in the case before us.

Staniar's case[5] was approved by the Court of Appeal *in In re Humphreys, ex parte Lloyd-George & George*[6] in which Chitty L.J., delivering the judgment of the Court, said at p. 526: "the solicitor to the trustee, whether in bankruptcy or in the case of an ordinary trust, has no lien on the trust estate. The trust estate in bankruptcy does not belong to the trustee; in equity it is the property of the creditors. The right of the solicitor to be paid out of the bankrupt's estate is only through the right of his client the trustee. He has no independent right." The Lord Justice referred to *Ex parte Harper, In re Pooley*[7], a case of misconduct, in which Lindley L.J. said of the solicitor, "he has no *locus standi* and no right to be paid out of the estate, except indirectly in this way, that he was the solicitor of the former trustee, Mr. Sheard. If whilst Mr. Sheard was trustee he had incurred any costs, charges and expenses properly chargeable to the estate, any part of which would, as between him and his solicitor, be payable to the solicitor, the solicitor would be enabled to get paid out of the estate. Legally Mr. Harper's claim for payment is only against his own client who retained him, and he has no right to be paid out of any other fund, except on the principle which I have stated." I gather from this that had there been no misconduct, the solicitor would have succeeded in his application for an order that the new trustee should pay his costs out of the estate. No question of a lien arose.

In none of the cases cited on either side was a lien claimed by a solicitor over trust funds in his hands.

In my opinion Mr. Salt had no lien on this trust fund. Whether in a suit against the trustee for his costs he could have obtained a charging order on the trust fund is a matter which does not arise in this appeal.

But there is another objection to Mr. Salt's claim. I have little doubt from the evidence and documents and from what was said and not said at the Bar that the $7,100 was paid to Mr. Salt as money due to the Mosque and that the intention was that Mr. Salt should hold it for the Mosque. Indeed, I should say that Mr. Salt was to pay it to the Mosque but for the difficulty that payments to the Mosque should be made to the treasurer, that, in this case to the defaulting trustee himself who had handed the money to Mr. Salt.

The money was in Mr. Salt's hands for a specific purpose and a bailee of money in his hand for a specific purpose can have no lien upon it apart from what might arise from carrying out that purpose: *Brandao v. Barnett*[8], *Stumore v. Campbell & Co.*[9].

In my opinion Mr. Salt has misappreciated his legal right but I see no impropriety in his conduct.

I would add that the record in this appeal extends to 250 pages. On the appeal reference was made to only 58 of these pages. A record should be confined to what is relevant to the appeal. It should be unnecessary to transcribe pages of irrelevant accounts for the sake of one relevant entry. The wastage of paper at a time when a shortage of stationery may be anticipated is deplorable.

The appeal is dismissed with costs. The money paid into Court and the deposit will be paid out to the respondent Board or to its solicitors.

Terrell, Ag. C.J. (F.M.S.)—The point for decision in this appeal is a very simple one, although the arguments of counsel ranged over a wide field.

Early in March 1939 the appellant, who is a Solicitor practising in Malacca, received from Hashim bin Haji Bachee, one of the trustees of the Kampong Kling Mosque, the sum of $7,100. This sum was money belonging to the charity, and its retention by Hashim instead of paying it to the trust account was a breach of trust in respect of which Hashim was subsequently charged and convicted.

The money was paid over to the appellant to make good the breach of trust, and from the moment it was paid, the money ceased to be Hashim's and became trust money. The respondents, who were subsequently appointed trustees of the charity, had certain statutory rights of supervision even before their appointment, and had been in communication with the appellant, who was representing the defaulting trustee, in connection with the enquiries which were being made by the Board. The position with regard to the $7,100 was perfectly well understood by all the parties concerned.

Ordinarily the trust funds were paid into a special banking account in Malacca. The banking account was under the control of the trustees, the

above-named Hashim and his younger brother Syed, who took little interest in the administration of the trust. In the circumstances the Board informed the appellant that they had no objection to the retention of the money by him and the payment thereout of bills properly due by the charity. In accordance with this arrangement sums aggregating more than $6,000 were properly paid out by the appellant, leaving a balance of $1,038.94 in his hands. In the meantime, on the 21st of June 1940, the respondents were appointed trustees by the Order of the Governor in Council. When, however, the respondents claimed payment of the balance in the appellant's hands, he claimed to be entitled to retain it against a Solicitor's bill for $1,250. The bill was properly made out against the trustees and committee of management of the mosque, who were the appellant's clients.. It is not suggested that the Board were ever the appellant's clients in this matter.

The only question therefore that arises is whether in law the appellant is entitled to the lien claimed. It is perfectly clear from the authorities that when a Solicitor acts in the matter of a trust, his clients are the trustees and not the trust estate. It is equally clear that a lien can only be claimed against a client. No case was cited where a Solicitor has claimed a lien against moneys which he held on behalf of the trust. The lien now claimed is the common law right to retain property of a client (see *Hailsham* vol. 31, page 238 et seq.). Money bound to be applied as trust money, or money paid to a Solicitor for a particular purpose, is expressly excluded. The position of a Solicitor acting for trustees is fully set out in the judgment of North J. in *Staniar v. Evans*[5] which is quoted by the learned Judge in the Court below, and which it is unnecessary to recapitulate. It is to be noted that the principle enunciated by North J. were expressly approved by the Court of Appeal in *In re Humphreys ex parte Lloyd George & George*[6] at p. 527.

It is of course not disputed that a trustee who is not in default is entitled as against the estate to an indemnity for costs properly incurred by him, and, as stated by North, J. at page 474, when money has to be paid by a trustee, and he is entitled to repayment of costs paid to his solicitor, the trustee is allowed to pay in the balance only. But North J. makes it quite clear that this is a matter of favour and nothing else. It is only necessary to examine the circumstances of this case to arrive at the conclusion that no such indulgence can be shown to the appellant. The bill of costs which is included in the record, although an itemized bill, makes no particular charge in respect of each item. On the contrary it is a lump sum bill. Some of the items may ultimately be recoverable from the trust estate, but it would appear that many of the items are in respect of work done by the Solicitor in connection with the trustee's defalcations, and such costs would certainly not be chargeable against the trust estate. The bill has not been agreed or taxed, and is incapable of being agreed or taxed in its present form. There is no sum therefore which the Court could as a matter of indulgence permit the appellant to retain, and as in law there is no lien, the learned Judge was right in directing the whole amount to be paid over to the Board.

Possibly the learned Judge went too far in stating that the appellant had acted improperly, but in my opinion he was certainly mistaken as to the legal position.

The appeal therefore should be dismissed with costs. The Court was informed that the whole amount of the claim had been paid into Court. There will accordingly be an order for payment out to the respondents or their Solicitors of the amount in Court. The deposit lodged on the appeal will likewise be paid out to the respondents or their Solicitors on account of their taxed costs.

Aitken, Ag. J.A.—Several times during the argument I asked Mr. Goho this simple question:—for what purpose was the $7,100 deposited with Mr. Salt. I never got an answer to it though the question is as important as it is simple. I must therefore answer it myself by drawing what appear to be the appropriate inferences from the undisputed facts of the matter.

The Kampong Kling Mosque is a Mohammedan charity at Malacca. At the beginning of February 1939 its financial affairs were almost entirely in the hands of a certain Hashim bin Haji Bachee who was both the paid treasurer of the Mosque and one of its trustees. The other trustee was his much younger brother Said bin Haji Bachee, who appears to have been a mere figurehead and to have taken no active part in the Mosque's affairs.

For some considerable time before February, 1939, Hashim had been misappropriating the funds of the Mosque and using them for his own purposes. A report to that effect was made to the Malacca Mohammedan and Hindu Endowments Board, and the latter took action under section 10 of the Mohammedan and Hindu Endowments Ordinance calling upon Hashim and Said to furnish the trustees' accounts over

an extensive period, and to produce their books of accounts and all supporting vouchers. Such action commenced on the 25th of February 1939.

On that same 25th of February, 1939, and after their interview with the Secretary of the Board, Hashim and Said went to Mr. Salt's office in Malacca to consult him in the matter. From the first item in the latter's draft Bill of Costs it appears that they were with him for two hours on that occasion, and that other interviews between Hashim and Said and Mr. Salt, or between Hashim alone and Mr. Salt, took place on the 26th, 27th and 28th of February respectively.

There can be no doubt but that Mr. Salt went into the whole matter very thoroughly and explained the duties and liabilities of a trustee to his clients and gave them the benefit of his advice.

What that advice was is not in evidence, but it is in evidence that the total amount of trust moneys misappropriated and misapplied by Hashim up to the 25th of February, 1939, was very approximately the sum of $7,100. On the 1st of March, 1939, the exact amount of $7,100 was paid into Mr. Salt's office at Malacca by Hashim, and was then paid into Mr. Salt's clients account at the bank.

Mr. Salt, in the course of his evidence in the Court below, admitted that he was aware of a *prima facie* breach of trust on the part of Hashim when he received the $7,100 from Hashim, and from Mr. Salt's letter to the Board of the 6th of March, 1939, it is quite clear that Hashim himself had told Mr. Salt that the whole of the $7,100 belonged to the Mosque. Moreover Mr. Salt knew, beforehand, that Hashim was going to pay the $7,100 to him.

From all these facts I have no difficulty in drawing three inferences:—

1. That Hashim confessed his breaches of trust to Mr. Salt;
2. That Mr. Salt advised Hashim that he must repair those breaches of trust as soon as possible, as well as comply with the Board's demands; and
3. That in pursuance of that advice, and for the purpose of repairing those breaches of trust, Hashim paid the $7,100 into Mr. Salt's office on the 1st of March, 1939.

Upon his receipt of the $7,100 it seems to me that Mr. Salt became a trustee thereof for the Mosque, and that no lien in his favour could arise unless he somehow or other lost his trustee status and character: see *Brandao v. Barnett*[8], *In re Clark ex p. Newland*[10] and *Stumore v. Campbell & Co.*[9]

It is true, of course, that every one concerned seems to have acquiesced in Mr. Salt paying certain of the Mosque's more pressing liabilities, both past and current, out of the $7,100, but I do not see how the making of those payments can have relieved him of his fiduciary position. Every one of them seems to have been a perfectly proper payment for a trustee to make.

I would therefore dismiss this appeal on the simple ground that the $7,100 was deposited with Mr. Salt for a specific purpose, and that he became a trustee thereof for the Mosque. As, however, that ground was never argued before us, at any rate on behalf of the appellant, I will endeavour to deal with Mr. Goho's arguments in support of the appellant's case on the assumptions (1) that the $7,100 was not deposited with Mr. Salt for any specific purpose, and (2) that he never became a trustee thereof for the Mosque.

On these assumptions Mr. Goho's contentions may be reduced to four simple propositions:—

(a) In proper cases the trustees of the Mosque were entitled to employ solicitors in or about the temporal affairs of the charity;

(b) In such cases the trustees were entitled to be indemnified against the costs and charges of such employment out of the funds of the Mosque;

(c) Mr. Salt was properly employed by Hashim and Said, either acting for and on behalf of themselves or as agents of the Committee of Management of the Mosque, in and about the temporal affairs of the charity;

(d) Therefore Mr. Salt has a lien over such of the trust funds of the Mosque as happen to be in the possession for his costs and charges, because the trustees are entitled to be indemnified out of those funds against those costs and charges.

Now I have endeavoured to put Mr. Goho's contentions into the simplest and most attractive form so that they will lose nothing by my transcription of them. Thus, if we take these four propositions one by one, I don't think that any lawyer would have the slightest hesitation in accepting the first two of them, (a) and (b).

As to (c), I have studied Mr. Salt's draft bill of costs and it seems to me that whilst a considerable number of the items composing it may be said to arise directly out of Hashim's breach of trust, yet a considerable number remains referring to matters in which the trustees might quite properly have sought for legal advice and guidance. It follows, therefore, that to some unascertained extent Mr. Salt was properly employed by the trustees in or about the temporal affairs of the charity. At any rate that is my opinion.

So the problem is reduced to this:—does proposition (d) follow as a matter of course now that propositions (a) (b) and (c) are granted. According to Mr. Goho the answer is in the affirmative, and the authorities he cited in support of that view are—*Turner v. Letts*[2], *In re Frith*[1] and *In re Dee Estates Limited*[3]. According to Mr. Zehnder the answer is in the negative, and in support of that view he cited —*Staniar v. Evans*[5], *In re Harper in re Pooley*[7], *In re Blundell*[11], *In re Humphreys, ex parte Lloyd George and George*[6], *In re Love, Hill v. Spurgeon*[12] and *Meguerditchian v. Lightbound*[13].

It will be convenient if I deal with Mr. Goho's authorities first.

In my opinion the head note to *Turner v. Letts*[2] at pages 95 and 96 accurately sets out what that case did decide. It reads as follows:

"The solicitor of an executrix had in that character title-deeds of the testator's leasehold property. He acted for the executrix in a suit instituted against her by **cestuis que trustent** under the will. On her death an administratrix **de bonis non** of the testator applied for the deeds to the solicitor, and on his refusal to give them up without being paid his costs, instituted a suit against him to have them delivered up. Held, that unless the estate of the executrix was indebted to that of the testator, her estate was entitled to a lien on the deeds for her costs, and that the solicitor had a lien to that extent. On the administratrix suggesting that the testatrix's estate was so indebted, the suit for delivery of the deeds was ordered to stand over until proceedings had been taken in the other suit to try that question."

I have read the judgment of Turner L.J. therein through several times without discovering anything in the nature of a general principle applicable to the facts of this case. Had Mr. Salt prepared a trust deed for the Mosque on the instructions of the trustees and obtained the execution thereof by all necessary parties, *Turner v. Letts*[2] would be an excellent authority to cite in favour of his right to retain that deed in his possession until paid his proper costs and charges.

The same remark applies to the second of Mr. Goho's cases, namely *In re Frith*[1] the headnote of which reads as follows:—

"Where a testator's business is carried on after his death by his trustees under a power in the will, the right of the creditors of the business to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter."

I have been unable to find anything in the judgment of Kekewich, J. which goes an inch beyond the headnote, and though it is of no assistance to Mr. Goho's contention that proposition (d) follows from the grant of propositions (a) (b) and (c), yet I suppose his real object in citing it was to show that, in spite of Hashim's breaches of trust, he and Said might have a right to be indemnified out of the Mosque funds, in respect of Mr. Salt's costs and charges, for work properly done for them in the matter of the Mosque's temporal affairs. I have already accepted that view, and it may be that Mr. Salt can 'claim the benefit of the indemnity to which the trustees are entitled', to adopt the words of Kekewich J. at page 346 of (1902) 1 Ch.; but that does not seem to me to confer on him any lien over trust funds of the Mosque in his possession.

The third of Mr. Goho's cases is *In re Dee Estates Ltd.*[3] and I think the headnote sets out accurately and concisely what the learned trial judge and their lordships of the Court of Appeal then decided. It reads as follows:—

"A company determined to issue mortgage debentures to be secured by a trust deed, and a trustee was proposed. The proposed trustee, who on the execution of the trust deed became the trustee for the debenture-holders, retained a solicitor to act for him in connection with the trust (the company being represented by another solicitor), and under this retainer the solicitor investigated the title of the trust property and approved the trust deed on behalf of the trustee:—

Held, that the solicitor was entitled, both as against the trustee and as against the debenture-holders, to a lien on the trust deed for all costs properly incurred in relation to the trust, notwithstanding that they were incurred before the execution of the deed."

As with *Turner v. Letts*[2], this case would have been an excellent authority to cite had Mr. Salt prepared a trust deed for the Mosque on the instructions of the trustee, obtained the execution thereof by all proper parties, and then refused to deliver it up unless and until paid his proper costs and charges in the matter. As Cozens Hardy M.R. said (at page 95 of the report): "It seems to me a simple and plain case of lien. It is the ordinary lien which a solicitor has for costs on his retainer by a client to prepare a particular deed". The only passage enunciating a general principle of any use to Mr. Goho appears to be the last sentence of the judgment of Buckley L. J. (page 96 of the report):—"As between *cestui que trust* and trustee the trustee is entitled to be indemnified by the *cestui que trust* against all costs, charges, and expenses which he has properly incurred in relation to the trust." That is undoubtedly sound law, but it does not seem to endow the trustee's solicitor with a lien for his unpaid charges over any trust funds which may happen to come into his possession.

To summarise these three cases, I cannot regard any one of them, or all of them taken together, as authority for the proposition that the solicitor employed

by trustees in or about the affairs of the trust has any lien whatsoever on the trust estate for his costs. If there is any such lien one would expect to find a full account of it in *Cordery's* Law relating to Solicitors, but I have searched the pages of the fourth edition of that authoritative work without finding any definite trace of it. At page 462 thereof there is a reference to the case of *Francis v. Francis*[14], which I followed up. In that case I found a passage in the judgment of Knight Bruce L. J. at page 119 of the report, which appears to envisage the possibility of a trustee's solicitor acquiring a lien over the trust funds where both his conduct and the trustee's are entirely free from blame. But that is the best I have been able to do in the way of finding some support for Mr. Goho's main contention.

I will now examine some of Mr. Zehnder's authorities, commencing with *Staniar v. Evans*[5]. The head-note, with the addition of one half sentence thereto for the purpose of setting out the facts more clearly, reads as follows:—

"Where a wrong order has been made by reason of misrepresentation or mistake of fact, the error may be corrected by a new order made notwithstanding the former order.

A solicitor employed in trust business is the solicitor of the trustees personally, and has no direct claim on the trust estate for costs.

An order was made on a trustee to pay into Court interest found due from him, and the balance beyond his costs to the taxed-of capital money certified to have come to his hands. The capital money had been received by the trustee's solicitors as part of the trust estate, 'and had been retained by them in payment of the costs and charges due to them for their client.' The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the Court made an order notwithstanding the former order that the solicitors should pay into Court the capital come to their hands with interest."

Subject to the slight amendment which I have ventured to make I think that the head-note accurately reflects what North J. did decide in *Staniar v. Evans*[5], but in the course of his judgment a passage occurs in which he lays down certain broad principles as governing and limiting the rights of solicitors who act for trustees. That passage reads as follows:—

"The person employed by trustees to act as their solicitor with respect to a trust estate, is commonly enough said to be a solicitor to the trust estate. But that is an inaccurate way of describing his position. He is not solicitor to the trust estate. He has no retainer from the trust estate, and he is not employed by the trust estate, but he is the person employed by the trustee for his own purposes as trustee. His retainer is by the trustee personally. The trustee personally is liable to pay his costs, and the trustee personally is the only person to whom the solicitor can look for those costs. The solicitor of the trustee has no lien whatever upon the trust estate for those costs. That is the general rule. There are certain exceptions to it by which a trustee's solicitor may in that character have a better claim. He may, for instance, have got a statutory charge by an order of Court in respect of his having recovered or preserved either the whole of the trust fund or some part of it. He may possibly have some lien on documents in his hands. He may have a right, as between himself and his client, to go against that client's share of the trust estate. But, except in those respects, he has no claim on the trust estate; the general rule is what I have stated. The trustee, on the other hand, has a right to be indemnified out of the trust estate with respect to expenses properly incurred by him on behalf of that trust estate, including among other things costs properly incurred by him in employing a solicitor, and the trustee having a right to be indemnified by the trust estate has a right to have that indemnity as a first charge on the trust estate; and the solicitor indirectly gets the benefit of that; but he has not directly any charge on the estate, and any payment he gets out of the estate is only through the right of the trustee, who is his employer, to be indemnified out of the estate. Therefore, the solicitor of the trustee does not stand in any better position as against the trust estate than his client the trustee himself does."

If North J. is correct in his assertion that the solicitor of the trustee has no lien whatever upon the trust estate for his costs is correct, then Mr. Salt's appeal is quite hopeless whatever assumptions we may make in his favour. But it may be argued that the wide language used by North J. was quite unnecessary for a decision of the question raised on the special facts before him, since the solicitor who had to refund the sum retained by him on account of his costs had only obtained an order in his favour by deceiving the Court as to the financial position of his client.

It is therefore of more than ordinary interest to find that this passage in North J. judgment in *Staniar v. Evans*[5] was considered by Stirling J. in *In re Blundell*[11]. During the argument *Staniar v. Evans*[5] had been cited to him as an authority for the proposition that "there is no lien on a trust estate for the costs of a solicitor".

At page 379 of 40 Ch. D. Stirling J. dealt with *Staniar v. Evans* as follows:—

"From the decision there, as I understand it, I do not at all differ. As I read that case it was this: There was a suit instituted for the execution of the trust, and by the Chief Clerk's certificate it was found that there was in the hands of the trustee a balance of £1,500 odd, including a sum of £660. The sum of £660 consisted of some mortgage debts which had been paid to the trustee's solicitors, together with interest, and it remained in the hands of the trustee's solicitors; but there had been no agreement between the trustee and the solicitors that the fund which had come to their hands should in any way be appropriated to the payment of costs. Then it was further proved that the trustee was, with the knowledge of the solicitors, utterly impecunious at the time the order was made for payment into Court, and that there was no probability of his being able to pay in any sum whatever. Mr. Justice North in that case held that the solicitors were liable to pay into Court the sum which they had retained in their hands, though a large sum was due to them from the trustee for costs; and the ground upon which his Lordship put it appears to me to be undeniable, viz., that

solicitors cannot contract with the estate; they have no lien on the estate; they can only get a lien by means of some proper agreement with the trustee. There had been no agreement whatever entered into. The trustee himself was a defaulter; he was unable to make any payment; he could not in any way resort to the trust estate for the payment of his costs, because he had already in his hands a large sum which he ought to have applied in the payment of the costs, and Mr. Justice North held that under the circumstances the solicitors could stand in no better position than the trustee. I confess that I cannot see how that decision can be quarrelled with in any way."

The position then is this:—that two distinguished Judges of the Chancery Division of the Supreme Court of England have laid it down that solicitors for trustees cannot contract with the trust estate, and have no lien thereon for the costs owing to them by the trustees. I have searched the English & Empire Digest and Mew's Digest to see whether I could find any instance of judicial dissent from that opinion, but without success. On the other hand I have found a clear endorsement of it in the judgment of Chitty L.J in *In re Humphreys*[6]. It seems to me, therefore, that whatever assumptions we may make in Mr. Salt's favour we must dismiss his appeal.

Before I close I should perhaps, mention the case of *Meguerditchian v. Lightbound*[13], in which the Court of Appeal in England laid it down that a solicitor does not acquire any lien on the fruits of a mere negotiation without litigation. I confess that this case came somewhat as a surprise to me, but the principle underlying that decision appears to be embodied in the following passage in the judgment of Bankes L.J. at page 308:—

"On the question of law it seems to me quite impossible to contend successfully that the rule of law which has been hitherto applied to the solicitor's lien in respect of property recovered can be applied to a case such as this. Mr. Leslie Scott has claimed that the underlying principle should be applied to it. With great respect to him, I can see a very good reason why the principle should be applied in cases where there are proceedings, whether they consist of an action or arbitration, but I can see very good reasons why they should not be applied when the solicitors are left free to take whatever course they choose in order to secure a compromise."

At any rate it seems to offer yet another reason why this appeal should be dismissed, and with costs.

Lest there should be any misunderstanding I desire to place on record my view that this case in no way reflects on Mr. Salt's professional honour and integrity. He has made a mistake as to his legal rights and obligations, that is all; and many another solicitor has made such mistakes in the past and will doubtless do so in the future.

Appeal dismissed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.

F. M. S. REPORTS.

RE LOOI GUAN KWAY; EX PARTE LOW SAY HOOI.

[O.C.J. (Murray-Aynsley, J.) Nov. 29, 1940]

Bankruptcy Enactment (Cap. 55), section 123—Civil Procedure Code (Cap. 7), section 287—1932 Rule No. 4, sub-rules 69 and 70—Bankruptcy notice—Insufficient address—Final decree—Failure to set-off.

The debtor took the following objections to the bankruptcy petition:

(i) that the bankruptcy notice did not give the place of business of the solicitor suing out the same;

(ii) that the bankruptcy notice was founded upon an order for costs in proceedings in which the creditor was a defendant, and as the amount found on taxation had merely been endorsed on the decree in the form of a certificate signed by the Assistant Registrar there was no final decree upon which a bankruptcy notice could be issued;

(iii) that the creditor had failed to give credit for a set-off for costs in an interlocutory appeal in the same proceedings in which the debtor was successful.

Held, as to (i), that as the debtor was not inconvenienced by the omission the objection came within section 123 of the Bankruptcy Enactment and was invalid.

As to (ii), the matter is covered by local legislation, namely, the Civil Procedure Code, section 237 and 1932 rule No. 4, sub-rules 69 and 70 and the objection was bad.

As to (iii), as no arrangement for set-off was arrived at until after the bankruptcy petition had been served, the objection was unfounded.

B. K. Das for petitioning creditor.

S. M. Sharma for debtor.

Murray-Aynsley, J.—In this case the debtor disputes the validity of the petition. The objections are set out in a notice dated 23rd August, 1940. The first objection is that the notice did not give the place of business of the solicitor suing out the same. The solicitor in question certainly did fail to give his place of business. It is equally certain that the debtor was not inconvenienced by the omission, because his solicitor gives the name and address of the firm of the creditor's solicitor in this notice of 23rd August. I think that the point is within the scope of section 123.

The second point is whether there was a "final decree" against the debtor. The facts in the present case are that the petitioning creditor had obtained against the debtor a judgment for costs in an action in which the petitioning creditor was defendant. The